

Policy Brief No. 6

Claiming Migrants' Rights
in Costa Rica through
Constitutional Law

Migration, Gender and Social Justice:
Connecting Research and Practice Networks



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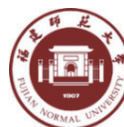
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Claiming Migrants' Rights in Costa Rica through Constitutional Law

Executive Summary

There are a large number of Nicaraguan migrants in Costa Rica, many of whom working in industries that have contributed to the country's economic growth over the past 30 years. Despite this, they are faced with anti-immigrant sentiment and inequalities. Moreover, since the implementation of the new *General Law of Migration and Alien Affairs* in 2010, Nicaraguan migrants have struggled to regularize, in conformity to this law, their status in Costa Rica. Based on an analysis of the legislation, this brief shows that some of the law's provisions create and perpetuate 'illegalities' and work to deny the human rights of certain migrants. In challenging the constitutionality of these sections of the law, important lessons in the realm of translating sociological study into policy change were learned, following which various recommendations are suggested.

Policy Brief No. 6: Claiming Migrants' Rights in Costa Rica through Constitutional Law

This policy brief has been prepared by a project team which included Carlos Sandoval-García, Esteban Sánchez-Solano, Mayela Castillo-Villachica, Karen Masís-Fernández, Marcela Montanaro-Mena, Olman Bolaños, Mónica Brenes-Montoya and Laura Paniagua-Arguedas. It is part of the IDRC-sponsored project 'Migration, Gender and Social Justice', and is based on research undertaken between 2005 and 2011 for the projects 'La Carpio: The experience of urban segregation and social stigmatization', which was supported by the Wenner-Gren Foundation for Anthropological Research and the Central American Jesuit Migration Service, and 'Advancing the Rights of Migrant Women in Latin America and the Caribbean', which was supported by the International Development Research Center (IDRC) of Canada. For additional insight into the findings of the research, see:

- Sandoval-García, C. (2013) 'Public Social Science at Work: Contesting Hostility Towards Nicaraguan Migrants in Costa Rica', in Truong et al. (eds) *Migration, Gender and Social Justice: Perspectives on Human Security*, Heidelberg: Springer.
- Sandoval, C. (2012) 'Contestar la hostilidad antiinmigrante en Costa Rica. Un proyecto de ciencias sociales públicas en curso', in M. Llona (ed.) *Entreverse. Teoría y metodología práctica de las fuentes orales*. Bilbao: Universidad del País Vasco/Euskal Herriko Unibertsitatea.
- Sandoval, C., M. Brenes and L. Paniagua (2012) *La dignidad vale mucho. Mujeres forjan derechos en Costa Rica*. San José: EUCR.
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- Brenes, M., K. Masís, L. Paniagua and C. Sandoval (2010) *Ciudadanías en práctica: el ejercicio de los derechos de las personas migrantes en Costa Rica a través de la Sala Constitucional*. San José, Costa Rica: CONAMAJ. Available at http://www.iis.ucr.ac.cr/index.php?option=com_k2&view=item&id=154:publicacion-del-cuaderno-qciudadanias-en-practica.

Introduction

Fueled since the 1980s by a number of factors—including war, economic instability and the natural disaster of Hurricane Mitch—Nicaraguan migration to Costa Rica has become a major case of South–South migration in the Latin American context. According to

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the most recent census, there were 287,766 Nicaraguans living in Costa Rica in 2011, comprising 6.6% of the country's total population.

Despite a recent trend of stabilization in migrant flows, however, Nicaraguan migrants continue to be cast in a rather harsh light in Costa Rica. As in Europe and the United States, there are concerns that migrants might overtake the native population and negatively impact security, the local culture and the availability of jobs for citizens in Costa Rica. These fears notwithstanding, Nicaraguan migrants have been indispensable to recent economic growth, working in Costa Rica's agriculture, construction, domestic services and private security industries.

This brief examines Costa Rica's current *General Law of Migration and Alien Affairs* and analyzes its effectiveness, using the example of Nicaraguan migrants—who warrant special attention given their large numbers and collective experience as characterized by anti-immigrant sentiment and a host of inequalities—as a case study. Based on research carried out at the Institute for Social Research at the University of Costa Rica collaboratively with key stakeholders between 2005 and 2011, this brief finds that the law as it is currently conceived creates and perpetuates 'illegalities' as well as denies human rights as guaranteed by international instruments of which the Costa Rican State is a signatory.

This brief then goes on to discuss efforts to translate these findings into policy impact *vis-à-vis* the constitutionality of certain provisions within the legislation. Finally, this brief provides lessons learned and recommendations for social scientists who seek to engage in policy analysis, who work collectively in advocacy with

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NGOs and migrants themselves, and translate their work into policy results.

Research findings

Costa Rica's current *General Law of Migration and Alien Affairs* (No. 8764) was approved by the Legislative Assembly in July 2009 and went into effect in March 2010. In general, it presents a series of modifications to the previous law and notably eliminates much of the vocabulary linked to security, which abounded in the earlier law, replacing it with that of human rights and alluding to multiple international agreements ratified and in effect in Costa Rica.

Article 3 of Act 8764 thus maintains: 'This Act regulates the control of migrants and encourages their integration into the society, based on the principles of respect for human life, diversity of cultures and people, and gender equality and solidarity as human rights guaranteed in the Constitution, and in international treaties and agreements duly signed, ratified and in force in the country.'

This new human rights emphasis has earned important legitimacy among stakeholders, but the new law combines this framing with specific provisions that encumber the migratory regularization process with overly burdensome fees, fines and requirements; allow for the potentially unfounded and lengthy detention of migrants and seizure of travel documents; and misallocate implementation responsibilities among various policing, immigration and judicial authorities.

Implementation of Costa Rica's new migration law involves high costs and fines, as well as a significant

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number of requirements, for obtaining and renewing residence and work permits. Such factors discourage immigrants in Costa Rica to follow through with various regularization procedures with the General Directorate of Immigration. In 2011, after implementation of Costa Rica's new migration law, the number of applications for residence permits filed with the Department of Migration and Foreigners fell by 50% after remaining stable between 2008 and 2010. That is to say, the provisions of the country's new migration law are working at cross-purposes with the goals of the law by discouraging migration regularization.

For instance, applying for a first-time residence permit now costs around 373 US dollars per migrant. Once the additional expenses borne by the applicant both in

Costa Rica and in his/her country of origin are accounted for, the total amount may be closer to 800 US dollars or more. In contrast, the monthly wages for migrants employed in the domestic service and private security sectors in Costa Rica are about 280 US dollars and 500 US dollars, respectively. Because the costs of attaining a work permit in Costa Rica are disproportionate to the wages that can be earned, this legal avenue of labour migration is effectively a disincentive whereas the very same law seeks to encourage it.

The law also establishes a series of fees to extend the period of residency or to change a migration category. For example, foreign-born persons categorized as tourists must pay 100 US dollars to prolong their stay in the country. In comparison, migrants wishing to change the category under which they migrated must—in addition to meeting the prerequisites to obtain the new category—pay 200 US dollars. Alternatively they can leave the country and re-enter on a different visa, in which case they must begin residency proceedings at a cost of 30 US dollars.

If one considers that such high costs are a factor impeding migrants from taking the necessary steps to regularize their status or renew their documents, the

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fees become a factor that impedes regularization (and thus, integration) itself.

Costa Rica's new migration law also creates rather cumbersome requirements for obtaining and maintaining residency in the country. For example, the law now mandates that affiliation to the public social security system is required for migrants to be eligible to begin the regularization process, despite the fact that, according to the 2011 Census, only 86.4% of the Costa Rican population is covered by social security. The lack of coverage among the working population is due to the location of the majority of jobs generated in the country in the informal sector of the economy. A consequence of this new requisite is that the insuring falls on the workers and exempts the employers of their responsibility.

Another new, overly burdensome rule relates to the grounds upon which a migrant's permanent residency can be cancelled—the failure to renew documentation within three months of its expiration. And for every irregular stay in Costa Rican territory, one must pay a fine of 100 US dollars for *each month* of that irregular stay or be prohibited from re-entry into Costa Rica for a period equivalent to triple the time of the irregular stay.

The insurance requisite, coupled with the severity of fines and penalties, will very probably increase non-documentation among migrants in Costa Rica. Thus, the country's migration law would produce the 'illegality' it aims to eradicate.

With respect to the potentially unfounded and lengthy detention of the foreign-born, it was found that Article 18 of the Migration Law dealing with the apprehension and detention of migrants does not mention the need for evidence of the commission of a crime for criminal

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detention. This violates both Article 37 of the Costa Rican Constitution and Article 5 (subsection 1, point a) of the United Nations Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live. Deprivation of freedom should in all cases be the exception and not the rule, particularly when evidence of criminal activity is lacking. Jurisprudence requires that measures less burdensome than detention be sought whenever possible to ensure the free movement of people as determined by the appropriate authorities. Moreover, the lack of an evidentiary requirement opens the door to racial profiling and arbitrary detention based on the prevailing xenophobia among Costa Ricans with respect to all immigrants and particularly Nicaraguans.

Additionally, Article 18 allows for an apprehended foreign-born person to be placed in the custody of the Department of Migration to start the corresponding administrative inquiry process and for the person to be handed over to the judiciary, though it does not set a deadline for doing so in either case. This violates the right of migrants to personal liberty as set forth in Article 7 of the American Convention on Human Rights, as apprehended migrants may be made to bear long periods of administrative detention without the acknowledgement or the authorization of a judge.

Article 31 of Costa Rica's new migration law also grants rather broad powers to the General Directorate of

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Immigration by empowering it to extend the detention of a migrant without having to resort to the order of a judicial authority. The law does not specify in which

situations the detention or provisional arrest can be extended.

For example, Article 31 states that the administrative detention of an immigrant can last no longer than 24 hours, but it allows for an extension of this period at the discretion of the General Directorate. An additional provision establishes that, once the identification of an apprehended foreign-born person is completed, administrative detention will be for 30 calendar days, within which deportation should be carried out. However, this period can also be extended in accordance with the law in special situations justified by the General Directorate. What a special situation might be is not explained. Both of the above provisions create legal uncertainty and violate migrants' fundamental right to personal liberty by allowing for the unlimited extension of administrative detention based on the sole discretion of the General Directorate, without establishing any control or measures to ensure reasonableness and proportionality.

Regarding the seizure of documents, Article 18 gives Costa Rican immigration authorities the power to seize the passports or other travel documents of foreign-born individuals without restriction and does not provide for how long the documents can be held. This is contradictory to Article 24 of the Constitution, which maintains that the seizure of documents is the prerogative of the judiciary alone.

In addition to allowing for the potentially unfounded and extended deprivation of migrants' freedom, Article 18 also misallocates certain implementation responsibilities among immigration authorities. Specifically, it gives the Professional Immigration Police, which is an administrative policing body, the power of investigation—an exclusive competence of the judiciary in Costa Rica.

'In addition to allowing for the potentially unfounded and extended deprivation of migrants' freedom, Article 18 also misallocates certain implementation responsibilities among immigration authorities.'

Article 18 thus undermines the principle of separation and balance of powers guaranteed by Article 9 of the Constitution.

Conclusion

The implementation of the new migration law has exposed a number of gaps and difficulties that violate the very principles of human rights and immigrant integration upon which the legislation was based. It is in this context that the challenge arose to try to contest some articles of the law in the Constitutional Court on the grounds of unconstitutionality or because they go

against international norms of which the Costa Rican State is a signatory.

Contesting this legislation involved not only systematizing some of the criticisms of the existing legislation, but also consolidating capacities to persuasively contest the need to make justice and citizens' rights prevail beyond nationality. The research team invited colleagues working in NGOs and churches to reflect on the scope of the law and on the possibilities of engaging in advocacy. In the framework of these initiatives, a paper that outlined the team's main concerns was delivered to the then-director of the Migration Directorate. In the paper it was suggested, for example, that the charges for obtaining documents need not be reduced,

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but that the documents should be valid for a longer period. As a result of this initiative, the Migration Directorate agreed to extend the validity of residence permits from one year to two for the first issuance and to three or four years for revalidations, as is verified in Article 56 of the Regulations of Alien Affairs, which was published in January 2011.

A second stage of the work consisted in convening an ongoing group for a more careful reflection on the law and on the possibilities of preparing a writ of unconstitutionality to be submitted to the Constitutional Court. By September 2011, a final version of the writ was submitted, and the Court partially admitted the action in April 2012. Overall, the Court admitted the claims against those articles in which the distinctions between faculties of the judicial and the executive powers were blurred, but it did not accept that high fees and fines were a matter of constitutional law. Up to November 2012, the Court had not made public its resolution regarding this case.

Implications and recommendations

Spanning the analytical and the normative, one of the still-pending tasks is to conceive of a public policy on migration that starts by recognizing the profound interdependence among migrants, their relatives and the receiving communities. Thousands of people have found employment and residence in Costa Rica, providing services to Costa Rican citizens; for example, many Costa Ricans can work at remunerated jobs because a Nicaraguan is caring for our children or older adults.

'Social scientists have the capacity ... to influence the development of policies that encourage regularization, respect the human rights of migrants and uphold the requirements of the nation's constitution and international instruments ...'

Some economic activities, such as construction, export agriculture, private security and paid domestic work, structurally depend on the participation of Nicaraguans.

Social scientists have the capacity, through their research and cooperation with migrants themselves and other key stakeholders, to influence the development of policies that encourage regularization, respect the human rights of migrants and uphold the requirements of the nation's constitution and international instruments, while also maintaining the exercise of immigration controls.

To this end, the following observations and recommendations are made:

- The costs for obtaining and maintaining legal migration status must be changed so that they are in line with the actual income that immigrant workers receive. The requirements for obtaining residence and work permits must also be more flexible to that they can be made available to people who suffer from being undocumented. Criteria such as reasonableness and proportionality are essential in the consideration of these changes.
- The discretion granted to administrative authorities by current immigration law has repercussions well beyond immigration itself, including the diminishment of fundamental rights such as freedom towards increasing security. In this context, advocacy is required to discuss and reflect on this transformation of the very foundation the modern State.
- Academic research faces the challenge of envisioning ways in which demands of communities can be registered and then translated into institutional circuits. The arena of constitutional rights is an especially relevant possibility when the fundamental rights of a fragile population, such as migrants, are at risk. In a similar vein, international rights is an arena in which migrants' claims must be heard. Only three countries in Latin America have not ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Convention 90); Costa Rica is one of them. We urge the Executive to sign the Convention and pass it to the Legislature as soon as possible.
- Increasing emigration of Costa Ricans, particularly to the United States, adds greater importance to this

ratification. In a wider perspective, Costa Rican emigration, the slow decline of Nicaraguan immigration to Costa Rica, the decline in birth rate and the rise of life expectancy demand from the Costa Rican state a public policy on population, and not only on immigration.

- In addition, the incapacity of sending states to provide their citizen migrants with documentation necessary for migration processes such as regularization in destination countries is a concern. Nicaragua does not facilitate access to basic documentation for its nationals in Costa Rica, as it does not issue identification cards in a rapid manner and does not provide for the identification of its citizens abroad. Although Nicaragua's National Assembly ratified the Apostille Convention, which reduces the costs of key documents necessary to comply with immigration processes in Costa Rica, Nicaragua does not issue passports at a low cost.

